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No. 09-1449

In The
Supreme Court of the United States

CLIFFORD B. MEACHAM, *et al.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Second Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older people. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA). Vigorous enforcement of the ADEA is of paramount importance to AARP, its working members, and the millions of other workers who rely on it to deter and remedy age discrimination in employment.

To help to ensure that the rights of older workers are protected, AARP has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts regarding the proper interpretation of the ADEA. *See, e.g., Gross v. FBL Fin. Servs.*, 129 S.Ct. 2343 (2009); *Kentucky Ret. Sys. v. EEOC*, 554 U.S. 135 (2008); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005).

AARP's concern in this case is that the Second Circuit's misconstruction of this Court's decision and

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[1] Pursuant to Supreme Court Rule 37.2, AARP notified the parties of its intent to file an *amicus curiae* brief in this case more than 10 days before the filing of the brief. The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* AARP states that no counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

mandate, which sends this case back to square one 15 years after the Petitioners were terminated and ten years after it was first tried, inflicts serious harm on the older Petitioners, and more importantly, significantly weakens the efficacy of the ADEA in deterring age discrimination in the workplace. Undoubtedly, many older workers, for whom time and delay are unforgiving, will decide to forgo challenging unlawful age discrimination altogether when they learn that achieving closure on their claims can take over a decade, with years of litigation being added by the courts. Congress was acutely aware of the peril that the passage of time posed to the rights of older workers and deliberately crafted its enforcement scheme to account for it. The Second Circuit's misconstruction of the mandate in this case effectively annuls Congress' efforts to protect older workers from the dangers of delay.

STATEMENT OF THE CASE

The Petitioners were terminated from Knolls Atomic Power Laboratory (KAPL) fifteen years ago during a reduction-in-force. They claim that their selection for the RIF was based on age. Of the 31 salaried exempt individuals who were terminated from KAPL, 30 were over the ADEA's protected age of 40 years, a figure that the U.S. Court of Appeals for the Second Circuit characterized as "startlingly skewed." *Meacham v. Knolls Atomic Power Lab.*, 381 F. 3d 56, 75 n.8 (2d Cir. 2004). In selecting the 31 employees to be terminated, KAPL relied heavily on rankings based largely on the subjective and unaudited assessments of "flexibility" and "criticality." *Id.* at 75.

The Petitioners commenced this litigation in January of 1997. In November 2000, after a jury trial lasting several months in the U.S. District Court for the Northern District of New York, the jury returned a verdict for the Petitioners. Almost ten years after that verdict, including being before this Court on two other occasions, this case still has not been resolved. In its tortuous ten-year history, two of the Petitioners have died. Most recently, the Second Circuit misconstrued this Court's mandate, set aside the reinstated jury verdict, and ordered a new trial. This latest misguided ruling will add years to the Petitioners' efforts to challenge their terminations that happened fifteen years ago unless it is overturned.

AARP agrees with the Petitioners that the Second Circuit misconstrued this court's decision and mandate. Accordingly, AARP will not duplicate that reasoning in its *amicus curiae* brief but will instead focus on the significance that the appellate court's misguided decision has for the rights of older workers and the efficacy of the ADEA in combating and deterring unlawful age discrimination.

ARGUMENT

A. CONGRESS DELIBERATELY CRAFTED THE ADEA TO PROTECT OLDER WORKERS FROM THE HARMFUL EFFECT OF DELAY.

Much has been written about the supposed differences between age and other forms of discrimination. For example, this Court has commented that unlike race or gender, age has not been subjected to a long history of discrimination[2] and that unlike other protected categories, age is not immutable.[3] However, an issue uniquely devastating to age is time. For as the Roman philosopher Cicero reflected, ". . . the young man hopes to live long; while the old man can have no such hope." MARCUS TULLIUS CICERO, ON OLD AGE, 51 (Andrew P. Peabody ed. & trans., Little, Brown, & Co.)(1884).

Because Congress was acutely aware of the severe prejudice that delay inflicts on older workers filing age discrimination complaints, it changed the manner by which the ADEA is enforced from one that would have entailed lengthy proceedings to a far more expedient process. Specifically, "[t]he ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age-discrimination

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[2] *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

[3] *Id.*

claims. The premise for this difference [from Title VII] is that the delay inherent in sequential jurisdiction is particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Mayer v. Evans*, 441 U.S. 750, 757 (1979) quoting 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

In addition to sequential state and federal administrative processing, Congress added § 7(d), § 626(d), to the ADEA which allows a victim of age discrimination to file a lawsuit after waiting at least 60 days from filing a charge with the Equal Employment Opportunity Commission (EEOC) instead of waiting for the agency to complete its processing of the charge as is the case under Title VII. This more expeditious procedure was enacted to take account of the fact that time works against older workers. The Second Circuit's misconstruction of this Court's mandate and decision adds years of unnecessary and wrongful delay to an already unreasonably prolonged case and frustrates Congress' carefully crafted plan to ensure to the greatest extent possible that delay does not prejudice the rights of older workers.

B. THE SECOND CIRCUIT'S DECISION UNDERMINES THE ADEA'S GOAL OF DETERRING AGE DISCRIMINATION BECAUSE OLDER WORKERS WILL BE RELUCTANT TO CHALLENGE AGE DISCRIMINATION IN EMPLOYMENT IF COURTS ALLOW LITIGATION TO BE UNNECESSARILY AND WRONGFULLY PROLONGED.

The ultimate objective of the ADEA is the elimination of discrimination in the workplace. *Oscar Mayer & Co.*,, 441 U.S. at 756 ; *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) ("The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions."). One of the ways the Act seeks to achieve that goal is through deterrence and restoration. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). The ADEA's provision granting age discrimination victims a private right of action, 29 U.S.C. § 626(c), is vital to the goal of "eliminate[ing], so far as possible, the last vestiges of discrimination." *Id.* at 417-18. "The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her." *McKennon*, 513 U.S. at 358. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices").

The Second Circuit's decision to send this already protracted litigation back to the district court for an entirely new trial, ten years after the first trial and fifteen years after the events that generated the case, will have a chilling effect on older workers who would otherwise exercise their statutory rights to file charges and institute litigation. The importance of the role of plaintiffs in enforcing civil rights statutes and in deterring employment discrimination in the workplace is well established. In *Newman v. Piggie Park Enters.*, a case brought under Title II of the Civil Rights Act of 1964, the Court stated that at the time of passage of the Civil Rights Act it was "evident that enforcement would prove difficult and the Nation would have to rely in part upon private litigation" to ensure compliance. 390 U.S. 400, 402 (1968). Thus, if the plaintiff prevails, "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* *See also* *Christianburg Garment v. EEOC*, 434 U.S. 412, 421 (1978) (citing *Newman* in stating that the plaintiff in a Title VII suit is the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'"); *Clark v. Am. Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971) (quoting *Newman* in finding that where Title VII litigants are acting "on behalf of a class and seek[ing] and obtain[ing] injunctive relief, they are acting as agents of the national policy that seeks to eliminate racial and other unlawful forms of discrimination in employment").

In a case brought under Title VII, this Court deplored the slow pace of employment discrimination litigation complaining that delays "are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment," before they can obtain relief. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982). As pointed out above, Congress itself has recognized that these delays are far more prejudicial to age discrimination victims who don't have the luxury of time. The Second Circuit's decision, if allowed to stand, will have a significant adverse impact on the ADEA's ability to deter unlawful age discrimination because its victims will be discouraged from taking advantage of the ADEA's private right of action to challenge unlawful ageism in the work place.

CONCLUSION

AARP respectfully submits that the petition for certiorari be granted.

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